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In the

Supreme Court of the United States

OCTOBER TERM 1949

No. 239

FREDERICK J. BOYCE, THELMA L. BOYCE, AGNES S. BRODIE, A. J. HENNEBERGER, D. N. KARALIS, C. H. KAVALARIS, R. F. LEE, LUCILE R. LEE, JOHN NASHOPULIS, MARIE W. OWEN, EMIL POULIOT, CLARA POULIOT, J. V. PIDGEON, H. RYDELL, CHARLES GRANT, J. ADDISON ENGLAND, and H. J. WALDROFF, Petitioners,

vs.

CHEMICAL PLASTICS, INC., Bankrupt, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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vs.

CHEMICAL PLASTICS, INC., Bankrupt, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT:

Petitioners respectfully show this Honorable Court:

SUMMARY STATEMENT OF MATTER INVOLVED

Question Presented.

Can a bankruptcy court be given a retroactive jurisdiction to validate an adjudication of bankruptcy that was void when made?

STATEMENT OF FACTS

Chemical Plastics, Inc., a Minnesota corporation, hereinafter called the corporation, was adjudicated a voluntary bankrupt on October 19, 1948, on a voluntary petition in bankruptcy filed on its behalf by its president and assistant secretary, without any corporate authorization. At the first meeting of creditors on November 5, 1948, petitioners, holders of the capital stock of the corporation, petitioned the bankruptcy court to vacate the adjudication and dismiss the bankruptcy proceedings, upon the ground that the voluntary petition in bankruptcy was filed without corporate authorization, no stockholders or board of directors meeting having ever been held to consider whether or not the corporation should file a voluntary petition in bankruptcy. Thereafter on November 15, 1948, before the determination of such petition, the board of directors of the corporation adopted a resolution ratifying and confirming the filing of the voluntary petition in bankruptcy. Thereafter on December 10, 1948, at a stockholders' meeting, a motion to dismiss the bankruptcy proceedings was made and lost. The referee dismissed such stockholders' petition upon the ground that the ratification by the board of directors of the corporation gave the bankruptcy court a retroactive jurisdiction that validated the adjudication. The action of the referee in bankruptcy was re-

viewed by the District Court and affirmed, the petition to vacate the adjudication of bankruptcy and dismiss the bankruptcy proceedings was denied on February 3, 1949. Notice of appeal was filed February 24, 1949. On appeal to the Court of Appeals, the judgment of the District Court was affirmed July 6, 1949 (R. 89-99).

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

(1) Since the filing of the voluntary petition in bankruptcy was unauthorized, the bankruptcy court had not, when the adjudication of bankruptcy was made, acquired jurisdiction. Hence the adjudication of bankruptcy was void when made.

(2) The attempted ratification by the board of directors, which was made after the adjudication of bankruptcy, could not give the bankruptcy court a retroactive jurisdiction to validate the adjudication of bankruptcy that was void when made.

GENERAL REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of bankruptcy law that has not been but should be settled by this court. This case involves a basic principle of jurisdiction of a bankruptcy court to make an adjudication—namely whether a bankruptcy court can be given a retroactive jurisdiction to validate an adjudication of bankruptcy which was void when made.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this honorable court and directed to the United States Court of Appeals for the Eighth Circuit, commanding

that court to certify and send to this court for its review and determination, a full and complete transcript of the record and all proceedings in the cause, to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners have such other and further relief in the premises as to this honorable court may seem meet and just; and your petitioners will ever pray.

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BRIEF IN SUPPORT OF PETITION

OPINION OF COURT BELOW

The opinion of the court below is printed in the record herein at pages 89-98.

JURISDICTION

The jurisdiction of this court is invoked under judicial code, Section 240, as amended by the act of February 13, 1925 (U. S. C. A., Title 28, Section 347, as amended by Title 28, United States Code, Section 1254, effective September 1, 1948. The date of the entry of the judgment sought to be reviewed and reversed is July 6, 1949 (R. 99).

SPECIFICATIONS OF ERROR

The United States Court of Appeals for the Eighth Circuit erred as follows:

(1) In affirming the judgment of the District Court which denied the petition to vacate the adjudication and dismiss the bankruptcy proceeding.

(2) In finding that the board of directors had validated the adjudication of bankruptcy by ratifying the filing of the petition in voluntary bankruptcy.

STATEMENT OF FACTS

The statement of facts appears in the petition and will not be repeated.

ARGUMENT

THE BANKRUPTCY COURT WAS WITHOUT JURISDICTION WHEN THE ADJUDICATION IN BANKRUPTCY WAS MADE.

It is well settled that officers of a corporation unless authorized by corporate action have no power to bind the corporation by the filing of a voluntary petition in bankruptcy and the filing of such petition confers no jurisdiction on the bankruptcy court. 1 *Collier on Bankruptcy* (14th Ed.), pp. 589-590; *In re Community Book Co., Inc.* (D. C., Minn.), 10 Fed .(2d) 616; *Arkansas Oil & Mining Co. v. Murray Tool & Supply Co.* (C. C. A. 8), 127 Fed. (2d) 564, 566-567.

In the case at bar it is admitted that the voluntary petition in bankruptcy was filed without corporate authorization. The referee found the executive committee had not been authorized to file a voluntary petition in bankruptcy (R. 67-68). He found that under Section 301.28 (8), *Mason's Minnesota Statutes,* 7492-27h, the executive committee had no power to direct the filing of a voluntary petition in bankruptcy (R. 68). He concluded that the action of the executive committee directing the filing of a voluntary petition in bankruptcy was invalid (R. 68). The District Court adopted the referee's findings (R. 83). The Court of Appeals based its decision upon the ratification by the board of directors which, it held, gave the bankruptcy court a retroactive jurisdiction. The Court of Appeals held that the board of directors had the power to authorize the filing of a voluntary petition in bankruptcy (R. 96-97). While this is not important, since no action was taken by either the board of directors or the stockholders until after adjudication, the fact is that under the law in force in Minnesota in 1948, such power was lodged with the stockholders. Section 301.36, Minnesota Statutes, reads as follows:

> "301.36. Voluntary transfer of corporate assets. A corporation may, by action taken at any meeting of its board of directors, sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property and assets, including its good will, upon such terms and conditions and for such consideration, which may be money or other property, as its board of directors deems expedient, when and as authorized by the vote of holders of shares entitling them to exercise at least two-thirds of the voting power on such proposal or the vote of such other portion, not less than a majority, or vote by classes, as the articles may require, at a shareholders' meeting called for that purpose, or when authorized upon the written consent of the holders of such shares. Notice of any such meeting shall be given to all shareholders of record, whether or not they shall be entitled to vote thereat."

This law appears for the first time in Chapter 300, Section 35, *Session Laws of Minnesota 1933,* and after the decisions cited by the Court of Appeals.

In the case at bar it would be conceded that if there had been no attempt at ratification, the adjudication would be void. In *In re Community Book Co., Inc.,* supra, where the voluntary petition in bankruptcy was filed without corporate authorization, the court's jurisdiction was attacked by creditors. The Court, in its opinion, said:

> "It is obvious that the petition in this case was ineffectual for any purpose. The court acquired no jurisdiction. The adjudication must be vacated, and the petition dismissed."

The Court of Appeals distinguishes *In re Community Book Co., Inc.,* supra, from the case at bar on the ground that the former lacked ratification after adjudication (R. 97). That there can be no ratification after adjudication will be shown later in petitioner's argument.

In the case at bar, then, since the filing of the voluntary petition was not authorized, the court had neither jurisdiction of the person of the corporation, nor juris-

diction of the subject matter. A court acquires jurisdiction of the person only when the person voluntarily comes into court and invokes the exercise of its power and its assistance to compel a defendant to render his rights under the law. 21 *C. J. S.*, Section 83 a, p. 122, note 10. In a voluntary petition in bankruptcy the debtor must voluntarily come into court and invoke the court's power to make an adjudication of bankruptcy. It is common learning that a court cannot determine any question until it has someone seeking relief through its power. *Union Colony of Colorado, et al., v. Elliott, etc.*, 5 Colo. 371, 381, 21 *C. J. S.*, Section 1, p. 16, note 10. A court, unlike an administrative board, is a passive forum for adjusting disputes and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based. *Sale, et al., v. R. R. Commission* (Cal.), 104 Pac. (2d) 38, 41. A court cannot act sua sponte, 21 *C. J. S., Section* 81, p. 121. General and special appearance, apply to a defendant where jurisdiction is obtained by service of process or a general appearance and has no application to the jurisdiction of a plaintiff. A court cannot acquire jurisdiction of a plaintiff by service of process. Of necessity, a plaintiff never makes a special appearance.

Jurisdiction of the subject matter consists of two parts:

> " 'Jurisdiction of the subject matter' means, not only authority to hear and determine a particular class of actions, but authority to hear and determine the particular question it assumes to decide." *Sache v. Gillette, et al.*, 100 Minn. 169, 172, 112 N. W. 386, 387, 11 L. R. A. (N.S.) 830, 118 A. L. R. 612, 11 Ann. Cas. 328.

See 49 *C. J. S.*, Section 19c, p. 49; *Reynolds v. Stockton*, 140 U. S. 254, 265, 11 S. Ct. 773; *Standard Oil Co. v. Missouri*, 224 U. S. 270, 281-282, 32 S. C. 406, 409.

Until such time as the corporation came into the bankruptcy court and invoked its power to make an adjudication of bankruptcy, the court in the case at bar was without jurisdiction of the person of the corporation or jurisdiction to determine the particular question it assumed to decide—to make an adjudication of bankruptcy.

THERE IS A DISTINCTION BETWEEN RATIFICATION BEFORE AND AFTER ENTRY OF JUDGMENT.

Ratification Before Judgment or While an Action Is Pending Is Well Settled.

The authorities cited by the Court of Appeals show that it overlooked the distinction between ratification before judgment and ratification after judgment, and that it relied upon authorities relative to ratification before judgment. The authorities cited are as follows:

Mechem on Agency, Section 529;
Bowles v. Wheeler (9th Cir.), 152 Fed. (2d) 34, 40;
Mass. Const. Co. v. Kidd (C. C., Mass.), 142 Fed. 286, 286;
Robb v. Vos, 155 U. S. 13, 39;
14A *C. J., Corporations,* Section 2246.

Examination of such authorities would disclose the Court of Appeals' failure to distinguish. In referring to *Mechem on Agency,* the Court of Appeals quotes the text of this section. The section is supported by four cases: *Ancona v. Marks,* 7 H. and N. 686; *Day Land and Cattle Co. v. State,* 68 Texas 526; *Frye v. Calhoun,* 14 Ill. 132; and *Stearns v. Klug,* 21 Victoria L. R. 164. In *Ancona v. Marks,* however, the ratification was before trial. In *Day Land and Cattle Co. v. State* the issue was whether the attorney general and the district attorney could bring an

action on behalf of the state without specific authorization. The question was urged by the defense from the outset. In *Frye v. Calhoun* the action was commenced by an attorney in the name of another without authorization and was dismissed for that reason. *Stearns v. Klug* was a case where the rule was applied to filing claims.

Bowles v. Wheeler quotes the text from *Mechem on Agency,* Section 529, and after citing authorities to sustain the text, says:

> "With authority in the administrator to delegate the suit-bringing function, the use of such power must be determined, not when the suit was brought, but when judgment is rendered."

It will be noted that it is specially held herein that authority must exist before judgment.

Robbs v. Vos was determined on estoppel. See 2 *A. L. R.* (2) 207 n.

14A *C. J., Corporation,* Section 2246, is in connection with ratification generally and cites only one case relative to ratification in an action. That case is *Massachusetts Const. Co. v. Kidd,* supra.

It is well settled, then, that where ratification takes place before judgment, of necessity the court has jurisdiction when the judgment is rendered.

Ratification before adjudication of bankruptcy on a voluntary petition in bankruptcy is not possible since, as in the case at bar, the adjudication takes places at once.

There Can Be No Ratification After Judgment.

A judgment depends on the jurisdiction of the court before it is rendered. A judgment rendered while the court is without jurisdiction is void and cannot be ratified. In *Pennoyer v. Neff,* 95 U. S. 714, 728, 24 Law Ed. 565, 570, bottom col. 2, the court, in part, said:

> "The judgment if void when rendered will always remain void. * * * The validity of every judgment

> depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

In *Bowles v. Wheeler,* supra, p. 40, already quoted, the court points out the necessity of jurisdiction before judgment.

In *Beck, et al., v. Semones, Adm'x* (Va.), 134 S. E. 677, 682, the court commented upon the ratification of judgments that were void when rendered, saying:

> "It is said, however, that the action of Beck was ratified by resolution of the board of directors adopted after the judgments were rendered. This was wholly unavailing. In order to render the judgments valid, it was necessary that Beck should have had the authority to act at the time the judgments were rendered. No subsequent action of the board could confer jurisdiction upon the court, if it did not exist when the judgments were rendered. If the defendant was not legally before the court when the judgments were rendered, the judgments were void."

The *Beck* case is cited in 49 *C. J. S.,* Section 452, p. 883, note 96. In *Taylor v. Focks Drilling & Mfg. Corp.* (Kan.), 62 Pac. (2d) 903, the action was to quiet title to 144 sections of land. Not all parties interested in the land were made parties to the suit, but were invited to become parties to the suit. The judgment rendered was void as to those who failed to become parties to the suit. However, after the entry of judgment some of the parties who had not joined in the suit as plaintiffs, attempted to ratify the judgment as to them by "ratifying interpleas." The court, in its opinion, page 906, held that judgment in favor of the unnamed plaintiffs was void and could not be ratified. In the following cases the court had jurisdiction of the plaintiff and the subject matter since its jurisdiction had been invoked by the plaintiff. The court did not have jurisdiction of the persons of the defendant. In *Simonsen v. Simonsen* (N. D.), 100 N. W. 708, it was claimed a motion to vacate a default divorce, where service by

publication was insufficient, amounted to a general appearance and validated the judgment. The court held that the general appearance did not relate back so as to validate the void proceedings. In *Godfrey v. Valentine* (Minn.), 40 N. W. 163, there was an appeal from an order denying a motion to vacate a default judgment where service by publication was insufficient. It was claimed there was a general appearance that validated the judgment. The court held that jurisdiction could not be conferred retroactively so as to validate a judgment that was a nullity. In *Irving Trust Co. v. Seltzer,* 40 N. Y. S. (2d) 451, 456, the court said that an appearance after entry of judgment does not have a retroactive effect so as to give a court jurisdiction to render judgment as though the defendant had appeared prior thereto.

It is clear, then, that where ratification takes place after judgment is rendered, the court of necessity was without jurisdiction.

BECAUSE OF THE EFFECT OF AN ADJUDICATION OF BANKRUPTCY, THERE IS EVEN GREATER REASON FOR NOT PERMITTING RATIFICATION THEREAFTER THAN IN CASE OF JUDGMENTS GENERALLY.

Adjudication of Bankruptcy Fixes a Status.

Bankruptcy is a rem action fixing a status. An adjudication in bankruptcy is in rem and fixes the status of the debtor as that of a bankrupt. *Myers, et al., v. International Trust Co.,* 266 U. S. 64, 73, 44 S. C. 86, 88. In England from an early date a bankrupt was considered civilly dead, so far as his property was concerned. *Smith v. Mills* (1585), 1 Coke's Reports 481, 506. *Brooks v. Sowerby* (1819), 3 Moore's Reports 157, 183. It has always been true in the United States that a debtor after being adjudi-

cated a bankrupt is considered civilly dead, so far as his property is concerned. *International Bank v. Sherman,* 11 Otto. 403, 406, 101 U. S. 403, 406, 25 L. Ed. 866; *Herndon v. Howard,* 76 U. S. 664-665 (9 Wall), 664-665, 19 L. Ed. 809.

If a probate proceeding was commenced against a natural person during his lifetime, the probate court would be wholly without jurisdiction. After the death of such natural person, the probate court could not be given a retroactive jurisdiction to validate such probate proceedings. The only jurisdictional difference so far as debtors' property may be concerned, between a bankruptcy proceeding and a probate proceeding is that in the bankruptcy proceeding the debtor is *civilly* dead and in the probate proceeding he is *actually* dead.

A decree of divorce fixes a status. If a divorce decree was obtained by unauthorized persons no one would contend that the same could thereafter be ratified and validated. An adjudication of bankruptcy, which fixes a status, can no more be ratified than a decree of divorce which fixes a status.

In the case at bar, the corporation was not civilly dead on the date of the adjudication of bankruptcy, October 19, 1948, since the court was without jurisdiction to make an adjudication in bankruptcy. If the ratification by the board of directors, 27 days after the adjudication, validated the adjudication of bankruptcy, then the corporation performed the supernatural—making the corporation dead, 27 days before the performance of the act that caused its death!

CONCLUSION

The adjudication of bankruptcy was void when made. Hence it could not be ratified or validated. The petition to vacate the adjudication of bankruptcy and dismiss the bankruptcy proceeding should have been granted. The Court of Appeals should have reversed the District Court.

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